Supreme Court of the United States

October Term, 1948—No. 603

SANTO BRETAGNA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Santo Bretagna, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York, affirming a judgment of the Court of General Sessions, New York County, entered upon a verdict convicting the petitioner and one William Rosenberg of the crime of murder in the first degree.

Jurisdiction

The petitioner and Rosenberg were convicted of murder in the first degree in the Court of General Sessions, New York County, on July 7, 1948. The trial court imposed a

death sentence (2595-6).* Petitioner and Rosenberg appealed to the Court of Appeals of the State of New York from the judgments of conviction. On January 13, 1949, the Court of Appeals (six judges sitting) unanimously affirmed the conviction of the petitioner and Rosenberg.

This petition is filed within ninety days from January 13, 1949, the date of affirmance, as required by law (28 U. S. C. §2101(c)). The jurisdiction of this Court is conferred by §1257 (3), Title 28, United States Code.

It was. and is, the petitioner's contention that an alleged confession had been obtained from him by methods which were violative of the due process clause contained in both the New York State Constitution and in the Fourteenth Amendment of the Constitution of the United States. The question was specifically raised upon the trial (1037, 1692-3), and in the Court of Appeals of the State of New York. The remittitur of that Court states:

> "Upon the appeal of the defendant Bretagna the following question was presented and necessarily passed upon, viz: The defendant Bretagna contended that the admission in evidence of his alleged confession violated the rights conferred upon him by the Fourteenth Amendment of the Constitution of the United States; this Court held that the admission of his confession in evidence did not violate such rights of the defendant Bretagna."

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* References are to folios in the Record on Appeal in the Court of Appeals of the State of New York.

Opinion Below

The trial court wrote no opinion. The opinion of the Court of Appeals affirming the conviction was written by Judge Desmond (Appendix A). The opinion contains no reference to the constitutional question raised. So far as the petitioner is concerned the opinion merely states:

> "We conclude that the trial was properly conducted and that the jury was justified, on the proof before it, in finding both defendants guilty. We affirm the convictions but write this opinion to comment on a point of law argued by appellant Rosenberg only. * * *"

Statutes Involved

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Section 395 of the Code of Criminal Procedure of the State of New York reads:

> "§395. A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but it is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Section 165 of the Code of Criminal Procedure of the State of New York states:

"§165. DEFENDANT, UPON ARREST, TO BE TAKEN BEFORE MAGISTRATE.

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

Section 1844 of the Penal Law of the State of New York declares:

§1844. DELAYING TO TAKE PERSON ARRESTED FOR CRIME BEFORE A MAGISTRATE.

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

Section 101 of the New York City Criminal Courts Act provides, in part, as follows:

"§101. COURTS TO BE HELD DAILY IN EACH DISTRICT.

"Except as otherwise provided in this section, there shall be a city magistrate's court held daily in every court district, and unless otherwise directed by the chief city magistrate, each city magistrate's court shall be open every day at nine o'clock in the morning, and shall not be closed before four o'clock in the afternoon, and the city magistrate assigned thereto shall be in attendance thereat except during a reasonable recess."

Summary Statement of Matter Involved

(a) Introduction

On January 13, 1948, the deceased, Benjamin Weiner, referred to on the trial as "Chippy" Weiner, was shot and killed in his apartment at 68 East First Street, Manhattan, where the deceased resided with his wife. The shooting took place at about 10 o'clock in the evening.

It was the People's claim that the petitioner fired the shots which killed the deceased at the behest of the co-defendant Rosenberg, who was present at the shooting, and that Rosenberg had some grievance against the deceased arising out of a dispute over a money matter or a hijacking transaction in which Rosenberg and the deceased were involved.

The petitioner testified in his own behalf and denied he was implicated in the crime. He further testified that his confession made to Assistant District Attorney Monaghan was extorted from him by the police and was obtained when he was physically and mentally exhausted.

Under the trial court's charge, which is the law of the case, the petitioner's conviction rests solely on the confession made to Assistant District Attorney Monaghan. Thus the judge instructed the jury (2561):

> "Of course, if you are not satisfied beyond a reasonable doubt that the confessions by either of the defendants to Mr. Monaghan were voluntarily made, and were true, then you will acquit such defendant, the voluntariness or truthfulness of whose confession you have such a reasonable doubt."

(b) Circumstances Under Which Petitioner's Confession Was Obtained

First: The Arrest. At about 8 o'clock on the night of March 14, 1948, the petitioner was taken into custody in Boston, Massachusetts, without a warrant (1054, 1522-3). No legal proceeding was pending against him at that time. The arrest was made by New York and Massachusetts police officers (1522). Assistant District Attorney Pagnucco of the Homicide Bureau of the New York District Attorney's office was present at the time of arrest (1136).

The petitioner was taken to the Boston Police Headquarters and was incarcerated there for the night (1523). The Assistant District Attorney asked the petitioner to sign a waiver of extradition which he did (1053-4).* It does not appear that the petitioner was taken before any Massachusetts court before signing the waiver. The next morning the Boston police handed him over to the New York officers and he was taken in shackles to the railroad station (1056). On the train the petitioner was continuously questioned by the police officers and the Assistant District Attorney about the crime in question (1057). The Assistant District Attorney told the petitioner that he, the petitioner, needed a physician (1058). During the trip the petitioner was apparently ill, not having slept, and was unable to eat (1058, 1309).

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* The waiver, which was on a printed form, contained the following: "And I hereby exonerate Edward W. Fallon, Superintendent of Police of the City of Boston, and all other persons, from any blame in interfering in my case, and release any and all rights of action which have accrued or may accrue to me against the said Superintendent of Police, or any other person, by reason of any interference with my person or liberty." (See Appendix B.)

SECOND: THE DELAY IN ARRAIGNMENT. The train arrived at the railroad station in New York on March 15th at about 2 o'clock in the afternoon (1309, 1372). An automobile was awaiting their arrival (1359). Police Inspector Goldman was in the automobile (1359). The inspector asked one of the police officers whether petitioner had told the police officer where he had disposed of the weapon. When the police officer stated that petitioner had not given him this information, Inspector Goldman told the petitioner "that he would rip it out of my heart" (1062).

Sometime between 2:30 and 3 P. M. the same afternoon, March 15, the group arrived at the New York Criminal Courts building (1373, 1608). The Magistrate's Court was in session and the petitioner could have been arraigned then and there (1638). Instead, he was taken to the Homicide Bureau of the District Attorney's office located on the sixth floor of the building mentioned (1319). In going there the petitioner and the law enforcement officers virtually passed the Magistrate's Court which is on the second floor of the same building (1310).

Placed in one of the rooms of the Homicide Bureau, under close confinement, the petitioner was kept there until he made the alleged confession between 3 and 4 A. M. the next morning, March 16 (1700, 1781). At about 5:30 A. M. he was taken by a detective to Eldridge and Houston Streets, New York, to point out where he had disposed of the weapon (1548, 1566-1569). Petitioner was then taken to Police Headquarters where he was photographed in the nude (1550). Petitioner was then taken to the line-up at Police Headquarters and back to the District Attorney's office. He was not arraigned in the Magistrate's Court until about 12:20 P. M. on March 16, about 22 hours after his arrival in New York (1538).

The failure to promptly arraign the petitioner was in violation of law—section 165 of the New York Code of Criminal Procedure; section 1844 of the Penal Law—acknowledged to be such by both Assistant District Attorney Pagnucco and by the trial court (1311, 2541). Thus, on cross-examination, Mr. Pagnucco testified (1309-11):

"Q. And when you arrived in New York, what time did you arrive in New York? A. It was shortly after 2 o'clock.

"Q. 2 o'clock—and was that a week day? A. It was a Monday.

Q. Monday. Do you know where the Felony Court is? A. On the second floor of this building.

Q. How long have you been a lawyer? A. Since June 13, 1933.

Q. Now, are you familiar with Section 165 of the Code of Criminal Procedure, requiring the arraignment of person without unreasonable delay? A. I am.

Q. And you were conscious of it on that day? A. (No answer).

Q. (Continuing) Weren't you, on the day that you had this prisoner? A. I am conscious of—

Q. Were you conscious of that on that date? A. I am conscious every time I am acting as an Assistant District Attorney.

Q. And you knew a violation of that was a misdemeanor, didn't you? A. I knew.

Q. Why didn't you take him to the Magistrate's Court without unreasonable delay?

Mr. Monaghan: I object to the form of the question.

The Court: Objection sustained.

Mr. Minton: I except."

As mentioned above, the trial judge held that in this case there was unnecessary delay in arraignment as a matter of fact and law (2541).

> "The question of whether delay was necessary is usually one of fact. However, it seems to me that here the facts are such as to leave a reasonable doubt on the subject. Such a reasonable doubt—like any other—should be resolved in a defendant's favor. I therefore charge you to treat this case as though there were an unreasonable delay, and to consider such delay, together with all of the other circumstances and facts, in determining whether Bretagna's confession and admission were voluntary."

The short of the matter is that the petitioner was illegally detained and his arraignment unlawfully delayed for the purpose of getting the confession in question.

THIRD: WHAT TOOK PLACE DURING THE TIME THAT THE PETITIONER WAS BEING HELD INCOMMUNICADO. What occurred during the time that the petitioner was being held incommunicado is in sharp conflict. Three things, however, are clear. One is that he denied his guilt; the second is that he asked for and was denied the right to counsel (1084); and the third is that between 3 A. M. and 4 A. M. on March 16 he made a "confession."

Upon the trial, the petitioner testified that during his detention the alleged confession was extorted from him; that he was given no sleep, rest or food, was questioned for long stretches, was abused, threatened, mistreated and manhandled by the police (1062-93, 1140, 144-54, 1158-70). The police officers involved denied the charges. To refute the claim that he had been assaulted, the officers relied

upon photographs taken of the prisoner shortly after the confession was obtained.

Notwithstanding the photographs, however, there was proof that the petitioner bore marks of violence.

Placed in jail on the night of March 16, the day of the confession, the petitioner was examined by Dr. Debon, the People's own witness and the jail physician, on March 17. The doctor found "two objective signs" of injury (1391). One was a black and blue mark on the inside of the upper part of the prisoner's right arm (1391-2); the other was a similar mark on his right eye (1394-5). See also the testimony of the People's witness Lo Guercio at folios 939-47.

The doctor acknowledged that, on a number of occasions thereafter, he examined the petitioner with reference to his complaint of pain in his head, neck and chest and along his sides (1407-22), and that aspirin and liniments were prescribed and given (1403, 1417-22). See also the testimony of the witness Baker at folios 1263-7, 1270-4. The doctor stated, however, that since the symptoms complained of were subjective he placed little if any credence in the petitioner's complaints (1409-27, 1438-9).

A mere reading of the doctor's testimony demonstrates an obvious effort to minimize and belittle the symptoms which he found. The following testimony, elicited on his cross examination, is highly illustrative of the doctor's bias and hostile attitude (1439):

> "Q. In other words, you didn't trust this man? A. No, I didn't.
>
> Q. Do you trust any of those people that are brought into the Bronx County Prison, or does the fact that they are brought in there, that you just don't trust them? A. Well, in the majority of the cases we don't trust them."

Question Presented

Is it due process of law in a capital case to receive in evidence a confession, where the proof on the trial warrants the conclusion that the confession was obtained while the petitioner was illegally detained and his arraignment was deliberately and unlawfully delayed, with the knowledge and approval of the prosecuting officials, where the proof warrants the conclusion that the petitioner was the victim of police brutality during the period of the unlawful detention, and where it appears that, prior to the making of the confession, the petitioner requested but was denied the right to the assistance of counsel.

Reasons For the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, in that the said Court of Appeals has affirmed a judgment and sentence of death, which, when tested by an appraisal of the totality of the facts in this case (Betts v. Brady, 316 U. S. 455, 462) discloses that petitioner was deprived of his life and liberty without due process of law. See:

Haley v. Ohio, 332 U. S. 596;
Malinski v. New York, 324 U. S. 401;
Ashcraft v. Tennessee, 322 U. S. 143;
Lyons v. Oklahoma, 322 U. S. 567;
Ward v. Texas, 316 U. S. 547;
Lisenba v. California, 314 U. S. 219;
Chambers v. Florida, 309 U. S. 227.
Turner v. Pennsylvania (certiorari granted), 334 U. S. 858.

WHEREFORE, your petitioner, Santo Bretagna, prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed and that the petitioner, Santo Bretagna, may have such other and further relief in the premises as this Court may deem proper.

Dated, February 14, 1949.

SANTO BRETAGNA
Petitioner

By HARRY G. ANDERSON
Attorney for Petitioner

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

HARRY G. ANDERSON
Attorney for Petitioner

Supreme Court of the United States

October Term, 1948

SANTO BRETAGNA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN SUPPORT OF PETITION

The application for certiorari is made under §1257, Title 28, of the United States Code. The pertinent part of this section is as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The remittitur of the Court of Appeals states:

> "Upon the appeal of the defendant Bretagna the following question was presented and necessarily

passed upon, viz: The defendant Bretagna contended that the admission in evidence of his alleged confession violated the rights conferred upon him by the Fourteenth Amendment of the Constitution of the United States; this Court held that the admission of his confession in evidence did not violate such rights of the defendant Bretagna."*

POINT FIRST

The facts set forth in the petition, considered separately and cumulatively, clearly establish that the receipt in evidence of the alleged confession was violative of the due process provision contained in the Fourteenth Amendment of the Constitution of the United States.

I

In *People* v. *Valetutti,* 297 N. Y. 226, at 232, the Court said:

> "Obviously we cannot first use it (the confession) in weighing this man's guilt, then move on to an examination of its trustworthiness and admissibility (see *Bram* v. *United States,* 168 U. S. 532, 541). 'Whether true or false, confessions obtained in violation of section 395 of the Code of Criminal Procedure are not sufficient to sustain a conviction.' (*People* v. *Barbato, supra,* 254 N. Y. at p. 174)."

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* The constitutional question was also raised upon the trial (1692, 1693).

II

The trial court instructed the jury:

> "Of course, if you are not satisfied beyond a reasonable doubt that the confessions of either of the defendants to Mr. Monaghan were voluntarily made, and were true, then you will acquit such defendant, the voluntariness or truthfulness of whose confession you have a reasonable doubt" (2561).

The trial court repeated this instruction at folios 2564, 2565.

III

This Court has decided in several cases that it is empowered and it is its duty to make an independent examination of the facts for the purpose of determining whether a conviction in a criminal case, and particularly where a death sentence has been imposed, was obtained by forbidden methods which conflict with the Fourteenth Amendment (*Haley* v. *Ohio,* 332 U. S. 596; *Ashcraft* v. *Tennessee,* 322 U. S. 143; *Ward* v. *Texas,* 316 U. S. 547; *Lisenba* v. *California,* 314 U. S. 219; *Pierre* v. *Louisiana,* 306 U. S. 354).

In *Ashcraft* v. *Tennessee, supra,* this Court said at p. 147,

> "This treatment of the confessions by the two State Courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of 'independent examination' of petitioners'

> claims which, in any event, we are bound to make. *Lisenba* v. *California, supra.* Our duty to make that examination could not have been 'foreclosed by the finding of a court, or the verdict of a jury, or both.'"

In *Betts* v. *Brady,* 316 U. S. 455, 462, this Court said:

> "Asserted denial (of rights under the Fourteenth Amendment) is to be tested by an appraisal of the totality of the facts in a given case."

IV

The cynical disregard of the petitioner's rights began in Boston. There, on March 14, 1948, he was arrested at 8 o'clock in the evening by New York and Boston police officers. The New York officers were accompanied by an assistant district attorney from New York. The arrest was made without a warrant. There was no criminal charge pending against petitioner in New York or Massachusetts. Petitioner was never brought before a court or judge to advise him of his rights. Petitioner was lodged in the Boston police headquarters and evidently, under a gentleman's agreement, the custody of petitioner was turned over to the New York police. On the same night petitioner was induced to sign a waiver of his rights. This waiver was witnessed by three persons, evidently Boston police officers. The waiver, which was on a printed form, was not offered in evidence upon the trial. The district attorney, however, has supplied petitioner's attorney with a photostatic copy thereof, and the text is printed as an appendix (Appendix B) to this brief. The waiver contains this significant provision:

"And I hereby exonerate Edward W. Fallon, Superintendent of Police of the City of Boston, and all other persons, from any blame in interfering in my case, and release any and all rights of action which have accrued or may accrue to me against the said Superintendent of Police, or any other person, by reason of any interference with my person or liberty."

On the following morning, shackled to a police officer, petitioner was taken by train by the New York police officers to New York.

This whole procedure was a violation of Article IV, §2, subd. 2 of the United States Constitution, and §3182, Title 18 of the United States Code (1948).

Extradition proceedings are not creatures of state law but are controlled by the Constitution of the United States (Art. IV, §2) and by federal statutes (*U. S. ex rel. McCline* v. *Neyering,* 75 Fed. [7th Cir.] 716). The validity of extradition proceedings depends upon whether there was a pending indictment or charge in the demanding state (*Compton* v. *Alabama,* 214 U. S. 1).

V

The lawless acts of the police officers continued when the petitioner and his captors reached New York City. The police officers accompanied by the assistant district attorney arrived at the railroad station in New York at about 2 P. M. on March 15th. A police car was waiting and the party was driven to the Homicide Bureau of the District Attorney's office. The Felony Court, presided over by a city magistrate, was in session for arraignments as required by Section 101 of the New York City Criminal Courts Act. It is no exaggeration to say that the police

officers and the assistant district attorney with the petitioner in custody passed the door of the Magistrate's Court which is located on the second floor of the same building to which petitioner was taken (1310). This was a clear and deliberate violation of §165 of the Code of Criminal Procedure and constituted a crime by the police officers (Penal Law §1844).

On the train from Boston to New York petitioner was pressed by the police officers and the accompanying assistant district attorney to make a confession. Petitioner, however, denied his guilt. The inquisition which was carried on by relays of police officers began from the time of petitioner's arrival in the district attorney's office shortly before 3 P. M. on March 15th. The taking of the alleged confession began at 2:47 A. M. on March 16th and was completed at 3:50 A. M. (1700-1781). During this period, petitioner testified that he was threatened and assaulted by the police, that no food was furnished to him, and that he was not allowed to go to a toilet to urinate until after the taking of the alleged confession was completed. This was denied by the police officers (Rothengast, 1329-1356; Goldman, 1356-1384; Gallagher, 1447-1458).*

Petitioner testified that, prior to the making of the alleged confession, Police Inspector Goldman said to him, "I suppose you have retained a counsel before you were arrested." Petitioner replied that he had not but that he would like to obtain the services of a lawyer and to have his people notified (1083-4). The Inspector's reply was, "You will not have a lawyer until you're good and ready

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* "Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime, * * *." (*Ashcraft* v. *Tennessee*, 322 U. S. 143, 152).

to get one" (1083-4). Inspector Goldman was a witness on the trial (1356-1383), but did not deny that this conversation took place.

That the failure of the police promptly to arraign petitioner before a magistrate in violation of the law was a studied and deliberate act is confirmed by the fact that petitioner was not arraigned before a magistrate on March 16th until about 12:00 o'clock noon. This was about 22 hours after he arrived at the district attorney's office. At 5:30 A. M. on March 16th petitioner was taken to the Elizabeth Street police station and "booked." He was then taken by the police to Eldridge and Houston Streets where, according to the testimony of Officers Murray and Whelan, petitioner indicated where he had thrown away the weapon used in the killing (1547, 1548, 1567, 1568). Petitioner was next taken to police headquarters where he was compelled to submit to being photographed and lodged in a cell at police headquarters (1550, 1551). He was then taken to the line-up at police headquarters and back again to the district attorney's office.*

It is not disputed that the Magistrate's Court was open on March 16th at 9 o'clock in the morning as required by law. Petitioner was not arraigned, however, on that day until 12:20 P. M. The places to which the police took petitioner after the alleged confession was made were located in the immediate vicinity of the Magistrate's Court. Upon the trial the prosecutor utilized the proof which was obtained during the continued illegal detention of the petitioner. This proof was that the petitioner had indicated to the police where he had thrown the weapon used in the commission of the crime (1548), and there was offered in

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* See *Malinski* v. *New York*, 324 U. S. 401, 424; *People* v. *Kuhne*, 57 Misc. 30, 37; aff'd 195 N. Y. 610.

evidence the photographs of the petitioner's naked body for which petitioner was forced to remove his clothes (172, 173).

The deliberate delay in the arraignment of petitioner before a magistrate was in a real sense a further denial of the right to the assistance of counsel, for if the police officers had complied with the law and arraigned petitioner, the magistrate would have been required to advise petitioner of his right to obtain counsel (New York Code of Criminal Procedure, §188).*

In *Haley* v. *Ohio*, 332 U. S. 596, this Court said:

> "It is said that these events are not germane to the present problem because they happened after the confession was made. But they show such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five-hour grilling of this boy was conducted in a fair and dispassionate manner. When the police are unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year old boy behind closed doors in the dead of night becomes darkly suspicious. * * *
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> "The course we followed in Chambers v. Florida, 309 U. S. 227, White v. Texas, 310 U. S. 530, Ashcraft v. Tennessee, 322 U. S. 143, and Malinski v. New York,

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* Petitioner appeared before the magistrate on March 16, 1948, without counsel. The district attorney requested an adjournment of the hearing for two weeks. Prior to the adjourned day the proceedings were superseded by the finding of the indictment filed March 19, 1948. Attorneys were assigned to the petitioner when he was brought before the Court of General Sessions to plead to the indictment. This is the first time that petitioner had the aid of counsel.

324 U. S. 401, must be followed here. The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."

VI

The record indicates beyond question that the failure of the police officers to arraign petitioner in the magistrate's court was with the approval if not the advice of an assistant district attorney. This assistant district attorney was present in Boston when the petitioner was apprehended and accompanied the police officers on the trip to New York. He was with the police officers when the petitioner was brought to the district attorney's office which was around 2:30 P. M. on March 15th. The assistant district attorney was admitted to the bar in 1933 and for many years had been connected with the Homicide Bureau of the district attorney's office. He was called as a witness for the prosecution but was not asked to give any explanation for the failure of the police to comply with the law (1305-1308).

We quote from the cross examination of the assistant district attorney (1308-1318; 1326-1329):

"Q. Well, now, let me ask you: You were the Assistant District Attorney that went to Boston? A. I am.

"Q. And you were present in the Boston Police Station with the Boston police officers and the New York officers? A. I was.

"Q. And you rode down on the train with him? A. I did.

"Q. And he told you he had not slept all the night that night? A. He said he couldn't sleep because he was worried.

"Q. He said he couldn't sleep? A. (No further answer.)

"Q. And that he couldn't eat, that his stomach was upset, is that right? A. He did.

"Q. And when you arrived in New York, what time did you arrive in New York? A. It was shortly after 2 o'clock.

"Q. 2 o'clock—and was that a week day? A. It was a Monday.

"Q. Monday. Do you know where the Felony Court is? A. On the second floor of this building.

"Q. How long have you been a lawyer? A. Since June 13th, 1933.

"Q. Now, are you familiar with Section 165 of the Code of Criminal Procedure, requiring the arraignment of a person without unreasonable delay? A. I am.*

"Q. You have read that? A. I did.

"Q. And you were conscious of it on that day? A. (No answer).

"Q. (Continuing) Weren't you, on the day that you had this prisoner? A. I am conscious of—

"Q. Were you conscious of that on that date? A. I am conscious every time I am acting as an Assistant District Attorney.

"Q. And you knew a violation of that was a misdemeanor, didn't you? A. I knew.

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* Chief Inspector Rothengast who was in charge of the investigation admitted that he was familiar with the statute which requires a person to be arraigned without unnecessary delay (1347).

"Q. Why didn't you take him to the Magistrate's Court without unreasonable delay?

"Mr. Monaghan: I object to the form of that question.

"The Court: Objection sustained.

"Mr. Minton: I except.

"Q. Did you take him to the Magistrate's Court? A. I took him to the office of the District Attorney—

"Q. Will you answer the question yes or no: Did you take him to any Magistrate's Court? A. I did not take him at any time before—

"Q. Did you arraign him in any Magistrate's Court until the following day? A. I did not arraign him even then.

"Q. Who did arraign him on that day? A. Mr. Monaghan.

"Q. And do you know at what time he was arraigned in the Magistrate's Court? A. In the morning, to the best of my knowledge in the morning of June 16th—I mean of March the 16th.

"Q. And how many hours was that from the time you reached New York City? A. I think it must have been around twenty hours.

"Q. Twenty hours? A. (No further answer.)

"Q. And during that twenty hours was he in the custody of the police? A. I do not know in whose custody he was at all times, because I wasn't there most of the time.

"Q. Well, District Attorneys don't have people in custody, do they? A. (No answer.)

"Q. It is only the police? A. If they are in the office

of the District Attorney, they are in the custody of the District Attorney." (1308-1314)

* * * * *

"Q. When you arrived in New York did you make any inquiry of the Felony Court to determine whether it was open or closed?

"Mr. Monaghan: I object to that, your Honor, as being immaterial on the question of an Investigation.

"The Court: If he was the person in charge of the case, I will allow the question. You may ask the question, whether it is of this particular witness or some other person in the District Attorney's Office, is the thing in my mind at the moment. You may ultimately ask a question as to whether somebody in charge of the case made an inquiry.

"Q. Well, you were the Assistant District Attorney with the prisoner, weren't you? A. Yes, but Mr. Monaghan was in charge of the case.

"Q. Well you brought him to New York, didn't you? A. And I brought him to Monaghan.

"Q. And you were the Assistant on the case, weren't you? A. One of the Assistants working on the case.

"Q. Now I ask you, did you inquire to find out whether the Magistrate's Court was in session or not?

"Mr. Monaghan: I object to that.

"The Court: I will allow the question.

"A. I did not" (1326-1329).

A sovereign state will not stoop to conquer by using proof obtained by unlawful and unconstitutional methods. And the courts have declared that they will not condone the actions of public officers which are inconsistent with

recognized ethical standards (*Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnston*, 312 U. S. 275; *Nardone* v. *U. S.*, 302 U. S. 379, 383). This principle applies particularly to prosecuting officials (*Malinski* v. *New York*, 324 U. S. 401; *White* v. *Ragen*, 324 U. S. 760; *Viereck* v. *U. S.*, 318 U. S. 236; *Berger* v. *U. S.*, 295 U. S. 78; *People* v *Levan*, 295 N. Y. 26; *People* v. *Williams*, 292 N. Y. 297; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19; *People* v. *Reilly*, 224 N. Y. 90).*

In *Berger* v. *U. S.*, *supra*, Mr. Justice Sutherland, speaking for the Court said at page 88:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interests, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or innocent suffer. * * * It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The New York Court of Appeals has stated that it is the duty of the district attorney to prosecute police officers or other officials for failure to obey the law requiring that an accused be arraigned before a magistrate without unnecessary delay (*People* v. *Mummiani*, 258 N. Y. 394, p. 400).

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* An assistant district attorney is a public office and is required to take the oath prescribed by Article XIII, Section 1 of the New York State Constitution, "to support the Constitution of the United States and the Constitution of the State of New York * * *."

VII

Petitioner testified that on the train trip from Boston to New York efforts were made by the police officers to obtain incriminating statements from him. Petitioner, however, denied guilt. Petitioner testified that he was ill while on the train and was unable to eat any solid food. Petitioner testified that he had no complaint to make of the treatment accorded to him by the police officers on the train (1133-1137).

Petitioner testified that, when the train reached New York, there was an automobile waiting at the station. Inspector Goldman, who was in the automobile, inquired of the other officers whether petitioner had told them where he had thrown away the weapon with which the crime was alleged to have been committed. The inspector was told that petitioner had not done so, whereupon the inspector threatened petitioner with personal violence unless he disclosed this to the inspector (1062).

Petitioner was driven in the automobile to the district attorney's office and taken to a room in the Homicide Bureau. This was shortly before 3 P. M. on March 15th. In the district attorney's office he was questioned by a relay of police officers and was threatened and assaulted by some of the police officers (1148-1154). The police officers named by petitioner were called as witnesses and denied petitioner's testimony in this respect (1329-1356; 1356-1384; 1447-1458). The taking of the alleged confession began at 2:47 A. M. and was completed at 3:50 A. M. on the morning of March 16th. Around 5 o'clock the police took petitioner to Police Headquarters where he was forced to be photographed in the nude. These photographs were introduced in the trial (Exhibits 17, 18, 19 and 20, pp. 884-887 of the record). From Police Headquarters he was

taken to Eldridge and Houston Streets and was asked by the police to show where he disposed of the weapon with which the crime was alleged to have been committed (1547, 1548, 1567, 1568). After being booked in a police station house, petitioner was taken back to the district attorney's office. The places to which the petitioner was taken by the police were within a few blocks of the magistrate's court. He was not arraigned before the magistrate until 12:20 P. M. on March 16.*

VIII

After the arraignment in the Magistrate's Court, the petitioner was lodged in the Bronx County Jail. There he asked the jail authorities to send for a physician. On March 17 Dr. Debon, the jail physician, attended him and asked him where he had received the bruises on his body. Petitioner replied that they were inflicted during a beating at "homicide headquarters" (1098, 1099). Petitioner testified that he requested to have x-ray pictures taken, but this was not done (1099-1101). The pains and bruises lasted about two and a half weeks.

Dr. Debon was called as a witness by the prosecution. He testified that on March 17, he had the petitioner strip to the waist and examined him. The doctor found two objective signs of injury. The first was a black and blue mark an inch and one-half by two and one-half inches on the

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* Where arraignment is illegally delayed the irresistible inference is that it is for the purpose of obtainng a confession which would be otherwise unobtainable (*People* v. *Mummiani*, 258 N. Y. 394, 399). This is the rationale of the rule enunciated by this Court excluding the admission of a confession obtained after a failure to promptly arraign an accused before a commissioner in violation of the Federal Rules of Criminal Procedure, Rule 5 (a) (*Upshaw* v. *U. S.*, decided December 13, 1948; *McNabb* v. *U. S.*, 318 U. S. 332).

inside of the upper part of the petitioner's right arm. The other was a similar though less prominent bruise on the petitioner's right eye (1394). See also the testimony of the People's witness Lo Guercio at ff. 939-943.

In order to treat a patient intelligently, the witness acknowledged on cross examination, "a doctor has to know both objective and subjective symptoms" (1402), and that in this case he took such a history from his patient (1403). In short, the doctor stated his records of March 17 showed that the petitioner complained of pains alongside of his chest and neck, though there were no objective findings, "except tenderness on palpation" (1407, 1408), and that that meant "he registers pain" (1409), upon touching the affected parts (1407, 1408).

The witness sought to minimize the effect of his testimony just quoted by asserting that his patient's reactions were merely "claims" that "he registers pain" (1409). However, upon being pressed to give an opinion as to whether "did he register pain to you" (1409), the witness—a doctor of more than 25 years experience and obviously one not unfamiliar with the witness chair (1385, 1409)—attempted to evade answering by stating that "I am not here to give expert testimony" (1409). Directed by the judge to answer the question "Did it (the examination) register pain to you, as a physician, in your opinion," all that the doctor would say was, "Well, I can't tell you that, I don't know" (1411).

The Doctor's partisan and biased attitude towards prisoners in general, and the petitioner in particular, is shown by the following answers given by him on cross examination:

> "Q. In other words, you didn't trust this man? A. No, I didn't.

> "Q. Do you trust any of those people that are brought into the Bronx County Prison, or does the fact that they are brought in there, that you just don't trust them? A. Well, in the majority of the cases we don't trust them (1438, 1439).

The witness further admitted that, on about five occasions between March 19 and April 25, he examined the petitioner with reference to his condition (1415-22), and that aspirin and liniments were prescribed and given (1403, 1417-22). See also the testimony of the witness Baker at ff. 1263-67, 1270-74.

In *People* v. *Mummiani,* 258 N. Y. 394 at 401, Judge Lehman wrote:

> "We are told that here the defendant's story is improbable because he did not complain to prison physician, District Attorney or magistrate that he had been beaten. That is a circumstance to be considered by the jury, but it is certainly not conclusive. The prison physician testified that though no such complaint was made, his records show that the defendant did ask for zinc salve which is commonly used 'for an abrasion or contusion' * * * ."

Dr. Debon sought to have it appear that the petitioner's complaints as to the existence of subjective symptoms were *feigned.* In answer to the question as to why he prescribed liniment, the Doctor's answer was that the treatment was "*only psychological*" (1444). Could the Doctor have confused liniment with truth serum?

CONCLUSION

A

The trial court charged the jury that as a matter of law there was a failure to arraign petitioner before a magistrate as required by §165 of the New York Code of Criminal Procedure. See *People* v. *Snyder,* 297 N. Y. 81, 91, 92. This is the law of the case (*People* v. *Weiner,* 248 N. Y. 118; *People* v. *Lewis,* 238 N. Y. 1).

Upon the trial the prosecutor frankly admitted that he had directed the police officers to bring the petitioner directly to the District Attorney's office for the purpose of having him confronted with a number of witnesses who had previously been assembled there. The prosecutor stated to the jury:

> "Gentlemen, he was not taken to a police station. At my instructions he was brought to the District Attorney's office, where there were a number of police officers, where there were Assistant District Attorneys charged with the investigation of this case, where they were expected to—by their superiors, and by the people who put their superior in office—to use their brains and decent ability, if they have it, to honestly investigate a cold-blooded murder. And these men, these witnesses, people who could shed light on the crime, were brought to the office ahead of him, awaiting his arrival, so he could be confronted and a pack of lies broken down" (2335).

Accordingly the trial court instructed the jury as follows:

> "As to the contention that the defendant was threatened and beaten and coerced, I have already outlined to you the evidence which the People assert refutes it. As to the claim that the defendant Bretagna was illegally detained, the law is that an arrested defendant must in all cases be taken before the Magistrate without unnecessary delay. The facts in this case are that the defendant arrived in the city at 2:30 P. M. on March 15th, and was not arraigned until the following day at 12 Noon. The defendant claims that this delay was unnecessary, and hence a violation of the statute. The People claim, on the other hand, that before the defendant could be properly arraigned, it was necessary to confront him with witnesses against him, and to take other preliminary steps which, they assert, would not have been completed before the Magistrate's Court closed for the day" (2538-2540).

All that the prosecutor was able to say in his brief submitted to the Court of Appeals in explanation for the failure to promptly arraign petitioner before a magistrate was as follows:

> "The district attorney was then faced with the necessity of confronting him with the nine persons who had been held as material witnesses while he had been a fugitive, and with questioning him as to the accusations made by them."

Of course, this constitutes no reason or excuse for a disobedience of the law. (*People* v. *Snyder,* 297 N. Y. 81, 92.) The duty to promptly arraign the petitioner before a magistrate is explicitly required by law (§165 New York Code Criminal Procedure). In *People* v. *Alex,* 265 N. Y. 192, at p. 195, the Court said:

> "The law does not leave to the police discretion as to when a prisoner shall be arraigned. A desire to obtain evidence of guilt through confession may explain a delay but furnishes no legal justification for it, and evidence of other justification is wanting."

B

The petitioner's testimony that he asked Inspector Goldman for an opportunity to obtain counsel and to communicate with his relatives and friends was not disputed on the trial. Petitioner testified that he made this request to police Inspector Goldman. The inspector was a witness but did not deny petitioner's testimony in this respect. "An accused in a capital case requires the guiding hand of counsel at every stage of the proceeding against him (*Powell* v. *Alabama*, 287 U. S. 8, 45).

In *People* v. *Trybus*, 219 N. Y. 18, 22, the Court said:

> "The practice of detectives to take in custody and hold in durance persons merely suspected of crime, in order to obtain statements from them, before complaint and arraignment, and before they can see friends and counsel, is without legal sanction."

C

The petitioner testified that he was assaulted by the police in order to obtain the confession. This is confirmed by the testimony of Dr. Debon, the prosecution's witness. Under the law of New York "the district attorney was called on to account for the defendant's condition" (*People* v. *Valetutti*, 297 N. Y. 226, 227; *People* v. *Barbato*, 254 N. Y. 170, 176). On the trial the prosecutor offered no proof to account for the physical condition of the petitioner as testified to by Dr. Debon.

D

The unlawful action of the police in failing to promptly arraign petitioner before a magistrate was at the direction and with the approval of the prosecutor (see this brief, pp. 21-24; 30).

FINALLY

Laying aside any controversy as to the existence of physical mistreatment as was done in *Ward* v. *Texas*, 316 U. S. 547; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401; and *Haley* v. *Ohio*, 332 U. S. 596, the record in the present case discloses beyond question the employment of the indefensible practices which this Court has condemned as repugnant to the Constitution. The presence of any one of the grounds heretofore referred to has been deemed sufficient to require reversal, and as was said in *Ward* v. *Texas*, *supra*, p. 555, "All of them are to be found in this case."

Authorities Relied Upon

Haley v. *Ohio* (1947), 332 U. S. 596;
Malinski v. *New York* (1944), 324 U. S. 401;
Ashcraft v. *Tennessee* (1943), 322 U. S. 143;
Lyons v. *Oklahoma* (1943), 322 U. S. 567;
Ward v. *Texas* (1943), 316 U. S. 547;
Lisenba v. *California* (1941), 314 U. S. 219;
Chambers v. *Florida* (1939), 309 U. S. 227;

See also *Turner* v. *Pennsylvania* (certiorari granted), 334 U. S. 858.

The undisputed proof warrants the conclusion that the alleged confession was obtained by methods which this Court has condemned as violative of the due process of law provision of the Fourteenth Amendment of the Constitution of the United States. Petitioner therefore respectfully prays that certiorari be granted.

Respectfully submitted,

HARRY G. ANDERSON,
Attorney for Petitioner,
70 Pine Street,
New York 5, New York.

MILTON H. SPIERO,
Of Counsel.

APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—*v.*—

SANTO BRETAGNA and WILLIAM ROSENBERG,

Appellants.

Decided January 13, 1949.

APPEALS from judgments of the Court of General Sessions of the County of New York (STREIT, J.), rendered July 7, 1948, upon a verdict convicting defendants of the crime of murder in the first degree.

Harry G. Anderson for Santo Bretagna, appellant.

Abraham J. Gellinoff, *Matthew H. Brandenburg* and *Alfred Norick* for William Rosenberg, appellant.

Frank S. Hogan, *District Attorney* (*Whitman Knapp* and *Eugene A. Leiman* of counsel), for respondent.

DESMOND, J. These defendants, tried together, were convicted of murder in the first degree and sentenced to death, for the killing of Benjamin Weiner, in New York City, on January 13, 1948. We conclude that the trial was properly conducted and that the jury was justified, on the proof before it, in finding both defendants guilty. We affirm the convictions but write this opinion to comment on a point of law argued by appellant Rosenberg only.

In addition to certain circumstantial and corroboratory testimony, the People put in evidence, as against Rosenberg, his confession made to police officers and an assistant district attorney. The trial judge, after charging the jury that the voluntary character and truth of that extra-judicial admission had to be established beyond a reasonable doubt, declined to give certain additional instructions requested by Rosenberg's counsel. Those requests were as follows:

> "1. There is no direct evidence in this case of the commission of the crime by defendant Rosenberg.
>
> "2. The People's evidence of the alleged commission of the crime by defendant Rosenberg is solely circumstantial.
>
> "3. The Court is requested to charge on the law of circumstantial evidence.
>
> "4. The testimony as to the alleged confession by Rosenberg is not direct evidence of the commission of the crime by him, but is merely proof of a circumstance, namely, that he admitted the commission of the crime."

This court does not seem ever to have answered, in so many words, the question posed by the above-quoted requests, that is, as to whether a confession, made out of court but proven on the trial, is circumstantial or direct evidence. However, our affirmances in *People* v. *Conroy* (287 N. Y. 201) and *People* v. *Almodovar* (291 N. Y. 628) when read with the trial records and briefs on appeal in those cases, necessarily mean that such confessions are not circumstantial evidence (our reference in the Conroy *per curiam opinion,* to an inadvertent misstatement by the

trial court that the case was not one of circumstantial evidence, did not mean that the confession was circumstantial evidence, but that the case actually contained much other proof of a circumstantial character).

Certain cases in other courts, and some of the text writers, say that confessions are direct evidence or "in the nature of direct evidence" (see *Kinard* v. *State*, 19 Ga. App. 624; *Pressley* v. *State*, 201 Ga. 267, 270; *Mitchell* v. *State*, 76 Col. 346, 348, 350; *People* v. *Costello*, 320 Ill. 79, 108; *Evans* v. *State*, 199 Ind. 55, 63; *Sullivan* v. *United States*, 32 F. 2d 992, 994; Underhill's Criminal Evidence [4th Ed.], §4; 22 C. J. S. §§530 and 816-a). No decisions are found taking the opposite position (see 40 A. L. R. 571-573, and L. R. A. 1917D 595).

This court, following Bouvier's definitions, has, in *Pease* v. *Smith* (61 N. Y. 477, at pp. 484 and 485) defined direct and circumstantial evidence as follows: "Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses * * * Circumstantial evidence is the proof of collateral facts, and differs from direct and positive proofs in that it never proves directly the fact in question." In other words, direct or positive evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal, or "res gestae" facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal, or "res gestae" facts, and from which one or more of those principal facts may properly be inferred. Speaking most strictly, we would have to say that proof of an extra-judicial confession of guilt is not evidence at all, but a disclosure to the jury of an admission which renders other proof of guilt unneces-

sary (*People* v. *Hennessey*, 15 Wend. 147, 152), since it is an acknowledgment by the defendant, in express terms, of the fact of guilt. But, while it is thus not scientifically correct to call a confession "direct evidence", nonetheless a confession is, of course, competent on the question of guilt; and confessions have, traditionally, been spoken of, and treated as, evidence (see *People* v. *Valletutti*, and cases cited, 297 N. Y. 226, 232), the reason for their reception being "the great probability that a party would not admit or state anything against himself or his own interest unless it were true" (*Cook* v. *Barr*, 44 N. Y. 156, 158). Since, if properly proved under the appropriate rules and accepted by the court and jury, it goes toward establishing not facts from which guilt may be inferred, but guilt itself, a confession of guilt by a defendant in a criminal cause, is not circumstantial evidence. Furthermore, the accepted rules (see *People* v. *Weiss*, 290 N. Y. 160, 163) as to the kind and strength of circumstantial evidence required to support a conviction for crime, have no logical application to confessions (see Morgan, Yale L. J., Vol. 30, (pp. 356-357).

Of course, an extra-judicial admission by a defendant, not amounting to a confession because not directly acknowledging guilt, but including inculpatory acts from which a jury may or may not infer guilt, is circumstantial, not direct evidence.

The judgments of conviction should be affirmed.

Loughran, Ch. J., Lewis, Conway, Dye and Fuld, JJ., concur.

Judgments affirmed.

APPENDIX B

CITY OF BOSTON
POLICE DEPARTMENT

OFFICE OF THE SUPERINTENDENT

Boston, Mass., March 14, 1948.

I, Santo Bretagna, hereby certify that I freely and voluntarily consent and agree to accompany, Dets. Neylon and O'Brien & Miller, as a prisoner, from the City of Boston, in the County of Suffolk and Commonwealth of Massachusetts, to New York City, for the purpose of answering to the charge of Homicide there pending against me.

Furthermore, I hereby waive all my rights under the extradition laws of the United States, or of the State of Massachusetts, or of this Commonwealth, and am willing to return to the said New York City with the said Dets. Neylon & O'Brien & Miller without any requisition, warrant or other papers usually necessary in cases of extradition. And I hereby exonerate Edward W. Fallon, Superintendent of Police of the City of Boston, and all other persons, from any blame in interfering in my case, and release any and all rights of action which have accrued or may accrue to me against the said Superintendent of Police, or any other person, by reason of any interference with my person or liberty.

I hereby further verify that my legal rights have been fully explained to me, that I have had an opportunity to apply for a writ of habeas corpus, and that my consent

to accompany the said Dets. Neylon & O'Brien & Miller, as prisoner, as aforesaid, was not obtained by fraud, nor extorted by duress or threats, but freely, knowingly and understandingly given; that I freely, knowingly and understandingly waive all my rights and exonerate the said Superintendent of Police, and all other persons of any blame, and release them from all liability, as aforesaid; that the contents of this instrument have been carefully read and explained to me, and that I freely, knowingly and understandingly consent to and execute the same.

SANTO BRETAGNA

Boston, March 14, 1948.

I hereby certify that the above was carefully read and explained to the above named Santo Bretagna, and signed and sealed by him in my presence, without compulsion of the authorities here, and upon the free desire of the above named.

FRANCIS O'REILLY
ROBERT D. SNELLIN
GEORGE F. CASSELL

Boston, March 14, 1948.

RECEIVED of Captain Francis J. Hennessey the body of Santo Bretagna, fugitive from justice, wanted at New York City, for Homicide.

DET. JAMES M. NEYLON
Man. East. Homicide Sqd.
DET. JOHN J. O'Brien 9th Sq.